No. 18-966

IN THE

Supreme Court of the United States

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,
Petitioners,

v.

NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR THE COUNCIL OF THE GREAT CITY SCHOOLS AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

The Council of the Great City Schools ("Council") is a coalition of 74 of the nation's largest urban public school systems, [2] and is the only national

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[1] Pursuant to Supreme Court Rule 37.3(a), all parties have consented to the filing of this brief. Pursuant to Rule 37.6, amicus curiae certifies that no counsel for a party authored this brief in whole or in part, and no persons other than amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission.

[2] Albuquerque Public Schools; Anchorage School District; Arlington Independent School District; Atlanta Public Schools; Aurora Public Schools; Austin Independent School District; Baltimore City Public Schools; Birmingham City Schools; Boston Public Schools; Bridgeport Public Schools; Broward County Public Schools; Buffalo Public Schools; Charleston County School District; Charlotte-Mecklenburg Schools; Chicago Public Schools; Cincinnati Public Schools; Clark County School District; Cleveland Metropolitan School District; Columbus City Schools; Dallas Independent School District; Dayton Public Schools; Denver Public Schools; Des Moines Public Schools; Detroit Public Schools Community District; District of Columbia Public Schools; Duval County Public Schools; El Paso Independent School District; Fort Worth Independent School District; Fresno Unified School District; Guilford County Schools; Hawaii State Department of Education; Hillsborough County Public Schools; Houston Independent School District; Indianapolis Public Schools; Jackson Public Schools; Jefferson County Public Schools; Kansas City Public Schools; Long Beach Unified School District; Los Angeles Unified School District; Metro Nashville Public Schools; Miami-Dade County Public Schools; Milwaukee Public Schools; Minneapolis Public Schools; New Orleans Public Schools; New York City Department of Education; Newark Public Schools; Norfolk Public Schools; Oakland Unified School District; Oklahoma City Public Schools; Omaha Public Schools; Orange County Public Schools; The School District of Palm Beach County; The School District of Philadelphia; Pinellas County Public Schools; Pittsburgh Public Schools; Portland

organization exclusively representing the needs of urban public schools. Founded in 1956 and incorporated in 1961, the Council serves as the national voice for urban educators and provides a forum to share best practices. The Council is composed of school districts with enrollments greater than 35,000 students located in cities with a population exceeding 250,000. Districts located in the largest city of any state are also eligible for membership, based on urban characteristics. The Council's member districts have a combined enrollment of over 7.8 million students. Headquartered in Washington, D.C., the Council promotes urban education through research, instruction, management, technology, legislation, communications, and other special projects.

The Council has a strong interest in the outcome of this case, as its member districts have significant noncitizen and Hispanic populations included in their school communities. Council members also have significant numbers of students from low-income families and students with disabilities, who benefit from major federal educational improvement programs. Because funding for these programs is

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Public Schools; Providence Public School District; Puerto Rico Department of Education; Richmond Public Schools; Rochester City School District; Sacramento City Unified School District; San Antonio Independent School District; San Diego Unified School District; San Francisco Unified School District; Santa Ana Unified School District; Seattle Public Schools; Shelby County Schools (formerly Memphis City Schools); St. Louis Public Schools; St. Paul Public Schools; Stockton Unified School District; Toledo Public Schools; Toronto District School Board; Tulsa Public Schools; Wichita Public Schools.

allocated based largely on the census, an undercounting of noncitizens and Hispanics resulting from the inclusion of a citizenship question on the decennial census would have an adverse effect on all kinds of students in all kinds of schools, including traditional public schools, charter schools, and private schools in Council member districts. Indeed, the undercounting would result in a substantial misallocation of resources under federal education programs nationwide, harming Council members, other school districts, and the students they serve.

The Council and its members believe it is vitally important to provide educational opportunity to all students, and federal education programs—including those for students with disabilities and from low income families—provide critical support to that important mission. Since those federal programs allocate resources based on population, ensuring the fair and accurate administration of the census is critical to the Council's mission and that of its member districts.

SUMMARY OF ARGUMENT

Because the Secretary reached the decision to add a citizenship question arbitrarily and capriciously, the district court properly concluded that the Secretary's decision violated the Administrative Procedure Act. Similarly, because the Secretary's decision bears no reasonable relationship to the accomplishment of an actual enumeration of the population, the Secretary's action also violated the Enumeration Clause of the Constitution.

Moreover, it is virtually undisputed in this case that adding a citizenship question to the 2020 census would result in a significant undercounting of noncitizen and Hispanic individuals. And, the population count derived from the decennial census is used not only to apportion political districts but also to allocate hundreds of billions of dollars in federal funds, a substantial amount of which go to educational institutions of all kinds. The predictable undercounting of noncitizens and Hispanics would cause a significant misallocation of resources under federal education programs intended to help educational institutions serve our nation's most vulnerable students. Because the undercount will adversely affect the education of many children from all backgrounds in all types of school settings throughout the Nation, this Court should not allow it.

ARGUMENT

The district court correctly concluded that the Commerce Secretary acted arbitrarily and capriciously in adding a citizenship question to the decennial census despite overwhelming evidence in the administrative record that it would result in a *less* accurate count of the population. *See* Pet. App. 284a. Furthermore, because the Enumeration Clause requires the Secretary's actions to bear "a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census," *Wisconsin v. City of New York*, 517 U.S. 1, 20 (1996), the addition of a citizenship question also is unconstitutional. The Secretary ignored evidence that the citizenship question would depress self-response rates among

noncitizen and Hispanic persons, resulting in the misallocation of millions of dollars in federal funding, including funds supporting public education. Pet. Br. 30; Pet. App. 552a–554a, 556a–561a; *see also State v. Ross*, 358 F. Supp.3d 965, 2019 WL 1052434, at *66–69 (N.D. Cal. March 6, 2019).

It would be ironic indeed, if the Bureau was not required to count noncitizen children, when this Court has held that public school districts, including Council members, are constitutionally compelled to educate those same children irrespective of their citizenship status. *Plyler v. Doe*, 457 U.S. 202, 226 (1982). As discussed below, whatever purported benefits of adding the citizenship question to the decennial census are similarly "wholly insubstantial in light of the costs involved to these children, the State, and the Nation." *Id.* at 230.

I. The Census Plays a Significant Role In Guiding the Allocation of Federal Resources to Support Education.

Population counts derived from the census are used to allocate hundreds of billions of dollars in federal funding. *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 341 (1999). A substantial amount of that funding supports programs in all types of educational institutions, both public and private, at every academic level—elementary, secondary, and higher education. Such programs, relying on accurate census data, include Title II grants (preparing, training, and recruiting high quality teachers and principals),[3] Head Start,[4]

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[3] *See* 20 U.S.C. § 6611 (allocating Title II funds based, in part, on census data).

and Workforce Innovation and Opportunity Act Youth Activities.[5] Most importantly, the two biggest federal programs supporting elementary and secondary education rely on census data: Individuals with Disabilities Education Act (IDEA) Part B funding and Title I grants to local educational agencies. The impact on these two programs is discussed in Section III, *infra*.

II. The Secretary's Proposed Citizenship Question Will Result in a Significant Undercounting of Noncitizens and Hispanic Citizens.

The district court's finding that the Secretary's proposed citizenship question will result in depressed self-response rates among noncitizen and Hispanic individuals is well-documented in the administrative record, credible expert testimony, and the Census Bureau's own data.[6] The federal agency charged with

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[4] *See* 42 U.S.C. § 9835 (allocating Head Start Funds based on the number of children who are 3 or 4 years of age from families whose income is below the poverty line).

[5] *See* 29 U.S.C. § 3164 (allocating funds for youth workforce investment activities based on the in-school and out-of-school youth populations in the local area).

[6] Pet. App. 9a. ("Defendants' own documents and expert witness confirm that adding a citizenship question to the census will result in a significant reduction in self-response rates among noncitizen and Hispanic households. And expert testimony, based in large part on the Census Bureau's own analyses of past censuses, indicates that the Census Bureau's 'Non-Response Follow Up' procedures, extensive though they will be, are unlikely to remedy that reduction in self-response rates, which means that hundreds of thousands—if not millions—of people will go uncounted in the census if the citizenship question is included."); 43a (noting that the Bureau

implementing the census—the Census Bureau—acknowledges that the addition of a citizenship question would result in an undercounting of noncitizens and Hispanic citizens.[7] Indeed, Petitioner concedes that the Secretary admitted "that reinstating a citizenship question would reduce the response rate for noncitizens," and "agreed that a 'significantly lower response rate by noncitizens could reduce the accuracy of the decennial census.'" Pet. Br. 4; Pet. App. 552a–554a, 556a–559a. Therefore, it is virtually undisputed[8] that adding the citizenship question would result in a significant "differential undercount"[9] of these populations, the effects of which would include a "loss of political power and funds" for the undercounted communities.[10]

The district court found that the record overwhelmingly established that inclusion of a

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"concluded that including a citizenship question in the 2020 census questionnaire was likely to depress self-response rates, particularly among noncitizen households," resulting in "lower quality citizenship data").

[7] Pet. App. 139a–151a.

[8] *See* Pet. App. 141a ("[T]he proposition that addition of the citizenship question will cause a net differential decline in self-response rates among noncitizen households is otherwise undisputed.").

[9] The "differential undercount rate" is "[t]he difference between the net undercount rate for a particular demographic or geographic domain and the net undercount rate either for another domain or for the nation." U.S. Census Bureau, Decennial Statistical Studies Division, "Coverage Measurement: Definitions" (last revised Mar. 26, 2012), https://www.census.gov/coverage_measurement/definitions/.

[10] Pet. App. 9a.

citizenship question would cause "an incremental net differential decline in self-responses among noncitizen households of at least 5.8%" and could cause a much higher net differential. Pet. App. 150a. The court also found that Hispanic households will similarly experience a decline in responsiveness. Pet. App. 143a–144a. The most recent data suggests that Hispanic respondents are twelve times more likely to stop answering the questionnaire when they come to the citizenship question than non-Hispanic whites.[11] Pet. App. 144a.

The court below is not alone in its findings about the contents of the administrative record. The Northern District of California similarly found, based on the same record, that "adding a citizenship question to the 2020 census will cause a differential decline in self-response rates for noncitizen and Hispanic households." *Ross*, 2019 WL 1052434, at *4. Specifically, that court also recognized both a 5.8% significant differential response rate for noncitizen households and an escalating differential response for Hispanic households. *Id.* at *4, 6.

III. This Undercount Would Result in a Significant Misallocation of Resources Provided by Major Federal Education Programs.

The two largest federal elementary and secondary education programs are designed to support children from low-income families and students with

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[11] As the district court explained, the Bureau refers to this phenomenon as the "breakoff rate," meaning the rate at which households stop answering the questionnaire when they come to a particular question. Pet. App. 142a.

disabilities. Since the allocation of funding under both programs is based on the decennial census, the predictable undercounting of noncitizens and Hispanics would result in a misallocation of resources nationwide, undermining the purposes of these programs and harming students.

A. The undercount would undermine Title I, the largest federal education program supporting students from low-income families, and would thereby harm students attending all types of schools in Council member districts.

Title I of the Elementary and Secondary Education Act of 1965 ("ESEA")[12] is the federal government's largest single source of federal funding to support elementary and secondary education. Title I's stated purpose "is to provide all children significant opportunity to receive a fair, equitable, and high-quality education, and to close educational achievement gaps." 20 U.S.C. § 6301 (2015). In its modern form, Title I programs intend to improve learning for our nation's most vulnerable students, including children in our highest-poverty schools. Title I is used to support not only traditional public schools, but also charter schools, as well as to provide services in eligible private schools that serve students from low-income families. *Id.* § 6320.

The ESEA does not stipulate precisely how school districts must utilize Title I dollars. Therefore, Title I

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[12] *See* 20 U.S.C. § 6301 *et. seq.* (as amended by the No Child Left behind Act of 2001, Pub. L. No. 107–110, 115 Stat. 1425, and the Every Student Succeeds Act of 2015, Pub. L. No. 114–95, 129 Stat. 1802).

funds are used to support a wide variety of supplemental educational initiatives. For example, school districts use Title I funds for programs like extended-day kindergarten programs; learning laboratories and other innovations in mathematics, natural science, and computer science; after-school and summer programs to extend and reinforce the regular school curriculum; funding additional teachers, professional development, paraprofessionals, and classroom modernization resources; and many other initiatives.[13] For the 2017–2020 fiscal years alone, Congress authorized appropriations of over sixty billion dollars for Title I programs.[14]

1. The Department of Education allocates Title I funding primarily based on the number of children living in poverty according to the decennial census. Specifically, Title I allocations are based on four formulas: Basic Grants,[15] Concentration Grants,[16]

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[13] *See* William Sonnenberg, National Center for Education Statistics, *Allocating Grants for Title I*, 4 (Jan. 2016), https://nces.ed.gov/surveys/AnnualReports/pdf/titleI20160111.pdf.

[14] *See* 20 U.S.C. § 6302 (authorizing appropriations under Title I for fiscal years 2017–2020).

[15] *See id.* § 6333. The Basic Grant allocates Title I dollars to school districts based on the number of poor students they serve, as determined, in part, by the decennial census. A district qualifies for the funding if it has at least ten poor children and two percent of its students live in poverty. Thus, virtually all school districts receive at least some Title I funding.

[16] *See id.* § 6334. The Concentration Grant allocates Title I dollars to school districts based on the concentration of poor students they serve. A district qualifies for the funding if it has

Targeted Grants,[17] and Education Finance Incentive Grants.[18] Although several factors determine the total funds allocated to a specific school district, the ESEA explicitly ties almost all aspects of the allocation of Title I funds to the number of poor students a school district serves, as determined, in large part, by the decennial census.[19]

Generally, school districts are entitled to receive Title I funds "in proportion to their eligibility count."[20] To calculate school districts' eligibility to

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at least fifteen percent of children in poverty or 6,500 poor children, whichever is less.

[17] *See id.* § 6335. A Targeted Grant allocates additional Title I dollars to school districts as their poverty rate increases. A district qualifies for targeted funding when it has at least ten poor children and that number of poor children accounts for at least five percent of the district's school-aged population, as determined, in part, by the decennial census.

[18] *See id.* § 6337. Education Finance Incentive Grants allocate additional Title I funds to states, based in part on the number of children in poverty from the last decennial census.

[19] The U.S. Census Bureau's Small Area Income and Poverty Estimates program provides annual estimates of income and poverty statistics for all school districts, counties, and states. U.S. Census Bureau, Small Area Income and Poverty Estimates ("SAIPE") Program, FAQs (last updated Oct. 31, 2018), https://www.census.gov/programs-surveys/saipe/about/faq.html. SAIPE was established to provide statistical information for the administration of federal programs and the allocation of federal funds, and was designed for use in annual Title I allocations to school districts. *Id.* The SAIPE program's school district statistics are calculated based on data collected from the prior year's census and the Census Bureau's other surveying tools, including the American Community Survey. *Id.*

[20] Sonnenberg at 6. In fiscal year 2019, about 97% of the Title I eligibility count was identified by census poverty. Todd

receive Title I funds, the Department of Education determines "the number of children aged 5 to 17, inclusive, from families below the poverty level on the basis of the most recent satisfactory data . . . available from the Department of Commerce." 20 U.S.C. § 6333(c)(2). And to determine the "families that are below the poverty level," the Department of Education uses "the criteria of poverty used by the Bureau of the Census in compiling the most recent decennial census . . . ." *Id.* § 6333(c)(3)(C).[21] Moreover, the eligibility count is used to calculate other aspects of the Title I formula system, such as determining various "weights" for grant allocations [22] and

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Stephenson, U.S. Dep't of Educ., et al, *Title I Allocation Formulas* 12 (2018), https://www2.ed.gov/about/offices/list/oese/oss/technicalassistance/titleiallocationformulastitleiconfppt22018.pdf.

[21] *See also* 20 U.S.C. § 6333(b) (defining a local educational agency's eligibility to receive Basic Grants based on "the number of children counted under subsection 6333(c)"); *id.* § 6334(a)(1) (defining eligibility for Concentration Grants to include each district "which is eligible for a grant under section 6333" according to "the number of children counted under section 6333(c)"); *id.* § 6335(a)(1)(A) (defining eligibility for Targeted Grants to include local education agencies ("LEAs"), including school districts, based on "the number of children in the [LEA] counted under section 6333(c)"); *id.* § 6337(c) (defining eligibility for Education Finance Incentive Grants to include LEAs "based upon the number of children counted under section 6333(c)").

[22] *See* 20 U.S.C. § 6335(c) (establishing weights for Targeted Grants allocations to counties, LEAs, and States based on a count of eligible children under section 6333(c)); *id.* § 6337(d) (establishing that Education Finance Incentive Grant funds "received by States under this section shall be allocated within States to eligible local educational agencies on the basis of

determining the hold-harmless amount for all Title I recipients.[23] Thus, any undercount of census children would drastically affect the amount of funds an eligible school district receives under each formula.

In addition, the poverty measure used to distribute a district's Title I funds to eligible schools enrolling low-income students can be different from the census measure, and is typically based on income levels provided for the National School Lunch Program. Since most Title I schools operate "Schoolwide Programs" with their funds (which authorizes the use of Title I for all students in a school serving a community with over 40 percent low-income families or enrollment) the financial impact of a census undercount can harm a broader range of students than just those below the census poverty threshold. 20 U.S.C. § 6314(a)(1)(A). A school district's total Title I allocation is also a major source of federal funding for any charter school that operates within the school district, as well as the budgetary source for equitable services provided to eligible private school students residing within the district.

2. The undercount would have a serious adverse educational impact on students across the nation. Council staff, who work extensively with Title I formulas, calculated the estimated national misallocation of Title I funds if a significant undercount of noncitizen households occurred during the 2020 census. *See* Appendix A. The Council's

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weighted child counts" of eligible children under section 6333(c)).

[23] *Id.* § 6332(c).

methodology measures the potential impact of the proposed citizenship question on local Title I funding with a specific emphasis on the mixed-immigration status[24] families of urban students. *Id.* Accounting for the increased likelihood of undercounting children in mixed-immigration households, the Council estimates that tens of millions of Title I funds would be misallocated if the citizenship question is included in the 2020 census. Even a 2% undercount—a relatively modest reduction in response rates—would yield a national misallocation of $52.3 million. *Id.* A 5.8% undercount of noncitizen households would result in $151.7 million in misallocated Title I funds. *Id.* The impact on Title I funding, of course, would be even more dramatic if 10% of noncitizens were not to respond, yielding a startling $261.6 million in nationally misallocated Title I funds. *Id.* These estimates do not even include the anticipated undercount of Hispanic children who come from families of citizens and, therefore, represent conservative estimates of the amount of federal education funding that, annually for the next decade, would not be allocated where it is most needed based on the poverty levels of the children living in urban areas.

3. The undercount would have a serious adverse educational impact on Council member districts and other school districts where it occurs. Because of demographic patterns in the United States, many

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[24] A "mixed-immigration status family" is a family whose members include people with different citizenship or immigration statuses. One example of such a mixed-status family is one in which the parents are undocumented and the children are U.S.-born citizens.

members of the Council will be among those school districts adversely affected by an undercount of noncitizen and Hispanic households. Analyzing the likely effects on some member districts underscores the problem.

To illustrate the magnitude of the potential loss of funding if the citizenship question is included, the Council analyzed data from six representative school districts[25] from across the country using two different methods. First, the Council conducted an analysis using a methodology similar to the state-level analysis upon which the district court relied. *See* Appendix B; *see also* Pet. App. 178a–181a (discussing Dr. Andrew Reamer's methodology). [26] Based on this analysis, Council member districts stand to lose hundreds of thousands to millions of dollars, even based on the most conservative undercount estimates. For example, just a 2% undercount of noncitizen and Hispanic individuals

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[25] The districts include the Chicago Public Schools ("Chicago" or "CPS"), Clark County School District ("Clark County" or "Las Vegas"), Dallas Independent School District ("Dallas ISD"), Los Angeles Unified School District ("Los Angeles" or "LAUSD"), Miami-Dade County Public Schools ("Miami-Dade" or M-DCPS"), and New York City Department of Education ("New York" or "NYCDOE").

[26] Specifically, this first methodology uses a sequence of revised ratios (based on an undercount of noncitizen and Hispanic people of all ages within the district) that are ultimately applied to the existing local Title I allocation to determine a range of potential Title I losses in each school district. *See* App. B. This methodology is modeled on that described in the Declaration of Dr. Andrew Reamer in the court below. Dr. Reamer's methodology assumes that each of the undercount scenarios would affect each age group similarly.

would result in a reduction of $753,030 per year in Title I for Dallas ISD; $942,727 for Chicago; and $3,990,081 for Los Angeles. *See* App. B. But, the district court found that the citizenship question would likely result in a 5.8% undercount (at least among noncitizens). Pet. App. 150a. With a 5.8% undercount of noncitizens and Hispanic individuals, Clark County would lose $1,240,347 a year in Title I funding; Miami-Dade would lose $5,606,422, and the NYCDOE would lose an astounding $10,030,341 each year. App. B. Finally, given that the Census Bureau cautioned that the 5.8% estimate "was still conservative," Pet. App. 143a (internal quotation omitted), it is likely that the actual reduction of Title I funds would be much greater. Therefore, Council staff also estimated the potential loss in Title I funds to these districts in the event the undercount was as high as 10% among noncitizens and Hispanics. *Id.*

Moreover, the estimates above are conservative because they assume that the distribution of noncitizens and Hispanics is similar across all age groups. However, in many Council member school districts, the percentage of children from noncitizen and Hispanic families is significantly higher. Therefore, Council staff employed a second methodology to estimate the impact of an undercount of low-income children from families with noncitizen parents in the same six school districts. *See* Appendix C. These calculations (which do not even include an estimate of the impact of under-reporting by Hispanic students) estimate even larger impacts than those indicated by the first methodology.

Using this second methodology, for example, just a 2% undercount of noncitizen children would result

in a reduction of more than a million dollars in Title I funding per year in both Chicago and Los Angeles and approximately $3,689,659 per year in New York. *See* App. C. Assuming a 5.8% undercount of children from households including noncitizens, districts like Clark County (Las Vegas), Miami-Dade County and Dallas would lose more than a million dollars a year in Title I funding and New York would lose more than $10 million annually. *Id.* Finally, given that the Bureau cautioned both that the 5.8% estimate for noncitizen under-reporting "was still conservative," Pet. App. 143a (internal quotation omitted) and that Hispanic citizens would also be undercounted, it is likely that the actual reduction of Title I funds would be significantly greater. Therefore, Council staff also estimated the potential loss in Title I funds to these districts, if the undercount was as high as 10% among children in households with noncitizen parents. *Id.* The projected losses under that scenario are startling, with a district like Dallas ISD losing almost $2 million a year and New York losing almost $20 million a year.

Under any of these scenarios, Council member districts would lose significant amounts of federal education funding every year for the next decade, and the consequences of this loss in funding would be dire.

4. Decreases of this magnitude in federal educational funding would have a significant negative impact on the educational opportunities available to students. For example, in Dallas ISD, the district's Title I program provides support services to 154,418 students, many of whom come from extremely low-income households. The school

district thus uses Title I funding to provide a variety of wrap-around services to support low-income students and families. The programs would all likely be affected by reductions in Title I funding of the magnitude discussed above. These programs include an early learning program for pre-school and early-elementary-school students, [27] a program to help students who have been suspended transition back into school successfully, [28] a program to support homeless students and their families, [29] targeted

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[27] Dallas ISD has roughly 2,200 pre-k through 2nd grade teachers who serve about 46,000 students. Title I funds are used to support the improvement and quality of early learning and continuum of care by providing support to teachers and schools. A reduction in Title I funding would result in the loss of staff supporting this program.

[28] *See* Rincon, R., Dallas Independent School District, Department of Evaluation and Accountability, ***2017-18 Evaluation of Transition Services*** (2018). Dallas ISD's Transition Program provides licensed specialists in psychology and social work, assigned to campuses, to assist students with the successful transition of returning to their home campus from disciplinary alternative education programs, psychiatric hospital stays, and mental health related homebound placements. In 2017-18, 1,268 students committed offenses that led to placement in the disciplinary alternative placement in the District. The reduction in Title I funds likely would eliminate this program and three social worker staff.

[29] *See* Ledezma, L., Dallas Independent School District, Department of Evaluation and Accountability, ***2017-18 Evaluation of the Homeless Education Program*** (2018). The Homeless Education Program ("HEP") is designed to provide support services to homeless children and their families by facilitating their enrollment, attendance, and success in school. Currently, 2,786 students are identified as homeless in Dallas ISD. During the 2017-18 school year, HEP provided after-school/shelter programming to 395 homeless students, in addition to school uniforms and supplies to 91 students. The

support for students with disabilities for whom English is not their native language,[30] and mental health services to low income students and their families.[31] The loss of these education and wrap-around services would be especially distressing in a district like the Dallas ISD, because it has one of the highest rates of abject poverty and cross-generational poverty in the country. Although Dallas ISD has made significant strides in recent years by offering these innovative services, sufficient Title I funding remains necessary to address these needs.

The anticipated undercount would similarly affect Miami-Dade, which currently serves 331 Title I schools with over 235,312 students. The anticipated overall funding loss for the district would require

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reduction in Title I funds likely would force Dallas ISD to eliminate this program entirely.

[30] *See* Grimberg, N. Z., Dallas Independent School District, Evaluation Services, Evaluation and Assessment, ***2017-18 Evaluation of Special Education/English Learner Instructional Specialists Program*** (2018). As of October 27, 2017, there were 4,570 students dually identified as both English learners and receiving special education services in the Dallas ISD. A reduction in Title I funds would diminish supplemental aids, curriculum, and campus support to students by 19 staff members.

[31] *See* Mejan, M. Dallas Independent School District, Department of Evaluation and Accountability, ***2017-18 Evaluation of the Youth and Family Centers Program*** (2018). The Family and Youth Centers ("YFC") provide critical services to the District's most at-risk students by offering individual, group, and family therapy for students and their families. A total of 4,855 students received clinical mental or behavioral health services through the YFC program in 2017-18. A reduction to the YFC program would result in up to 22 primary staff members losing their positions.

Miami-Dade to reduce the federal Title I funds provided to schools, restricting the schools' ability to provide the supplemental services currently available for students. The estimated reductions in Title I funding would result in the loss of hundreds of staff positions, including classroom teachers, instructional coaches, and community intervention specialists. The loss of these personnel would not just affect low-income students; because Miami-Dade operates many Title I schools with Schoolwide Programs, all students in those schools would be negatively affected. In addition, in Miami, while many of those schools are traditional public schools, many others losing funds would be charter schools. Finally, because Miami-Dade has a significant number of low-income students in private schools, 7.63% of Miami's Title I funding (this year, $10,549,084) supports services for private school students. These students would also feel the negative effects of an undercount in the 2020 census for the next ten years.

In Clark County, the potential loss of Title I funds similarly would have a wide-reaching negative impact on students and families. Specifically, the two programs most affected by the undercount would be the Title I Pre-kindergarten program and the Family and Community Engagement Services department. In addition, 2.12% of Clark County's Title I allocation this year went to private schools, which totaled $2,003,646.00.

The NYCDOE, a political subdivision of one of the Respondents in this case, also would face funding deficits that could lead to the termination of critical educational and support programs. For example,

Title I funds in NYCDOE support additional teachers for academic intervention services in language arts and math, enrichment programs, before- and after-school programs, reduced class sizes, teacher professional and curriculum development, and parent and family engagement activities. Title I funds also support over 69,000 eligible students in non-public schools, which received $72.9 million in the most recent year.

In LAUSD, losing Title I funds would dramatically impact allocations to district schools and require significant reductions that could be as high as 200 staff positions for class size reduction teachers, counselors, instructional coaches, teacher assistants, librarians, nurses, psychologists, and psychiatric social workers. Also, reductions are likely for interventions and supports for students, parental engagement activities, technology for instruction and for student use, and other supplemental programs and materials.

Likewise, in Chicago, reductions in Title I funding would affect students in all of the more than 500 public schools that receive such funding and those in many private schools as well. This fiscal year, more than 8% of Chicago's Title I funds, or nearly $19 million, provide services to thousands of low-income students in non-public schools. These students, like the thousands in CPS public schools, would be adversely affected by the misallocation of Title I funds caused by the differential undercount resulting from the inclusion of a citizenship question on the decennial census.

B. The undercount also would undermine IDEA, the main federal education program supporting students with disabilities, and thereby harm all students in Council member school districts.

The Individuals with Disabilities Education Act ("IDEA") provides states with federal funds to support the provision of a free, appropriate public education ("FAPE") to eligible children with disabilities throughout the United States through an individualized education program. *See Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S.Ct. 998, 991 (2017) and 20 U.S.C. § 1412 (a)(1)(A) (2016). Protecting students with disabilities is of paramount importance to Congress, as illustrated in the text of IDEA: "Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities." 20 U.S.C. § 1400(c)(1).

IDEA has several purposes. First, it ensures "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." *Id.* § 1400(d)(1)(A). In addition, IDEA assists "States, localities, educational service agencies, and Federal agencies to provide for the education of all

children with disabilities." *Id.* § 1400(d)(1)(C). Finally, the IDEA also assesses and ensures "the effectiveness of, efforts to educate children with disabilities." *Id.* § 1400(d)(4).

The IDEA Part B State Grant Program is the second largest federal elementary and secondary education discretionary grant program. In fiscal year 2019, for example, it will provide grants totaling $12.4 billion.[32] This funding assists states and school districts in providing special education and related services for children with disabilities. These funds help meet the costs of special education in traditional public schools, in charter schools, and in private schools. *Id.* § 1412(a)(10).

Federal IDEA Part B funds are distributed to the states primarily based on their share of the national child population and the national population of children living in poverty (with a maximum age range of age 3 to 21), as determined by the Census Bureau through the decennial census and annually adjusted through the Census Bureau's American Community Survey sample and its Population Estimates Program.[33] $4.310 billion of the total

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[32] U.S. House of Representatives, Comm. on Appropriations, *Summary of FY 2019 Defense and Labor-HHS-Education Appropriations Minibus* (Sept. 14, 2018), https://appropriations.house.gov/news/press-releases/summary-of-fy-2019-defense-and-labor-hhs-educations-appropriations-minibus.

[33] Congress adopted the current IDEA Part B census-based funding formula in 1997, Act of June 4, 1997, Pub. L. No. 105–17, 111 Stat. 37, 49–51, to use the best available data source for determining each state's student population and poverty count, and purposefully abandoned the earlier disability-based child count from the original Education for All Handicapped Children Act of 1975, Act of Nov. 29, 1975, Pub. L. No. 94-142, 89 Stat.

annual IDEA Part B appropriation provides each state with a baseline amount equal to their funding in federal fiscal year 1999, and additional appropriations over that amount—$7.054 billion for federal fiscal year 2019, for example—are distributed according to each state's relative proportion of the nation's student population count (85%) and the nation's student poverty count (15%), adjusted by one maximum and three minimum statutory limitations. 20 USC § 1411(d).

An accurate census count of all students as well as those below the poverty line is thus essential to properly distributing over $12 billion in IDEA Part B funds to fulfill the federal commitment to share in the financial burden of meeting the federal statutory requirements for a free and appropriate public education for students with disabilities. *Id.* §§ 1401(9), 1412–1415.

Moreover, IDEA requires school districts to provide a FAPE to all students with disabilities, whether they have been counted in the census or not, and whether school districts receive adequate federal

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773. *See also* 20 U.S.C. §1411(d)(3)(A)(ii) (providing that "the Secretary shall use the most recent population data, including data on children living in poverty, that are available and satisfactory to the Secretary"). This census-based population and poverty formula removed the incentive for schools to over-identify students with disabilities and reap a federal financial benefit from higher statewide counts of student with disabilities. *See* Congressional Research Service, *The Individuals with Disabilities Education Act (IDEA) Funding: A Primer* (CRS Report No. R44624), https://crsreports.congress.gov/product/pdf/R/R44624.

funding or not. *Endrew*, 137 S.Ct. 993. As a result, when federal funds to support students with disabilities are not allocated to the states where these students reside, school districts must divert state and local resources away from other students to meet their responsibilities under IDEA. Misallocating funds under IDEA would simply result in school districts effectively "robbing Peter to pay Paul." *Milliken v. Bradley*, 433 U.S. 267, 297 n.3 (1977). Therefore, the misallocation of funds under IDEA would not only harm students with disabilities, but *all* students, including students in private and charter schools, in affected districts and states.

CONCLUSION

For these reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX A
Table 1

CGCS Methodology for Estimating the Impact of a Census Undercount on the Most Vulnerable Students in the Nation*

The Council of the Great City Schools (the "Council" or "CGCS") believes that demographic patterns across the country make a segment of the nation's school-age population more vulnerable to an undercount due to the inclusion of a citizenship question in the decennial census. Although it is likely that the national funding levels for Title I would remain unchanged by the resulting undercount, there would be a misallocation of federal funds across the nation as a result of lost federal funds in school districts that enroll students whose families include noncitizens. The Council developed a methodology that determines this total national misallocation of Title I funds that would result from the inclusion of a citizenship question on the decennial census. *See* Table 1.

In this calculation, we began with census data on the number of children aged 5-17 in the Nation who live with one or more parent who is foreign-born. We then applied the national percentage of noncitizens

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* The CGCS methodology was developed and applied by the following Council research and legislative staff: Executive Director, Dr. Michael Casserly; Director, English Language Learner Policy and Research Gabriela Uro; Legislative and Research Manager Moses J. Palacios; Director of Legislative Services Jeff Simering; Manager of Legislative Services Manish Naik.

among all foreign-born people in the country to derive an estimated number of children aged 5-17 living with one or more noncitizen parent. We multiplied that number of children by the national percentage of poverty of noncitizens to determine the number of Title I-eligible children living with a noncitizen parent throughout the United States. We then applied the undercount percentages (2%, 5.8%, and 10%) used by Dr. Reamer to get an estimated number of Title I-eligible children who wouldn't be counted by the census. This number of children, multiplied by the national average Title I per-child amount in federal FY 2019, results in the estimated national total of misallocated Title I funds.

Table 1: CGCS Total National Misallocation of Title I Funds that Would Result from the Inclusion of a Citizenship Question on the Decennial Census

Total 5-17 Population from Families with One or More Foreign-born Parents	13,023,893
Noncitizen Percentage of Foreign-born Population	51.9%
Number of Students Ages 5-17 with One or More Noncitizen Parents	6,759,400
Noncitizen Poverty Percentage	24%
Number of Poor Students Ages 5-17 with One or More Noncitizen Parents	1,622,256
Estimated Census Undercount of Poor Students Ages 5-17 with One or More Noncitizen Parents 2%	32,445
Estimated Census Undercount of Poor Students Ages 5-17 with One or More Noncitizen Parents 5.8%	94,091
Estimated Census Undercount of Poor Students Ages 5-17 with One or More Noncitizen Parents 10%	162,226
Title I Allocation Per Pupil	$1,613
Estimated Title I Misallocation with a 2% Undercount	-$52,321,916
Estimated Title I Misallocation with a 5.8% Undercount	-$151,733,558
Estimated Title I Misallocation with a 10% Undercount	-$261,609,582

Appendix B
Tables 2 and 3

Application of Dr. Andrew Reamer's Method of Estimating Funding Losses to Six CGCS Districts

The Council of the Great City Schools' (the "Council" or "CGCS") Title I analysis in Appendix B relies on the methodology set forth in the affidavit of Dr. Andrew Reamer † to calculate the local-level funding impact of the likely undercount due to the inclusion of a citizenship question on the 2020 census questionnaire. In Table 2, we provide a summary of the estimated range of Title I losses for six urban school districts based on the methodology described by Dr. Reamer. These estimates take into account a 2020 baseline population projection that assumes no citizenship question and calculates losses based on a percent of population undercount in six different scenarios if the citizenship question is included. The scenarios include (1) 2% of noncitizens are not counted in the 2020 census; (2) 2% of noncitizens and Hispanics are not counted; (3) 5.8% of noncitizens are not counted; (4) 5.8% of noncitizens and Hispanics are not counted; (5) 10% of noncitizens are not counted; and (6) 10% of noncitizens and Hispanics are not counted.

In Table 3, we provide details on the step-by-step calculations that were made to determine the estimated Title I loss in each scenario, using New

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† Declaration of Dr. Andrew Reamer, *New York Immigration Coalition, et al., v. U.S. Dep't of Commerce, et al.*, No. 1:18-cv-02921-JMF (S.D.N.Y. Nov. 7, 2018), ECF No. 508-1.

York City as an example. Table 3 outlines the baseline demographic and population data that is needed to begin Dr. Reamer's estimation methodology for Title I grants, and then sequentially calculates: (1) New York City's percent share of the United States population under the baseline 2020 scenario and the six undercount scenarios; (2) New York City's ratio of revised share to baseline share under each scenario; (3) New York City' s baseline percent share of the nation' s children ages 5 - 17 in poverty in FY 2019; (4) New York City' s revised percent share of children ages 5 - 17 in poverty under each scenario (multiplying actual share by the ratio of revised population share to baseline population share); (5) New York City' s ratio of revised share of children ages 5 - 17 in poverty to baseline share under each scenario; (6) New York City' s baseline percent share of the nation's total FY 2019 Title I allocation; (7) New York City's revised percent share of the nation's total FY 2019 Title I allocation under each scenario (multiplying actual share by the ratio of revised share of children ages 5-17 in poverty in FY 2019 to actual share; (8) New York City's Title I allocation under each scenario (multiplying the revised share by the actual total FY2019 spending); and (9) calculating the difference between New York City's actual and revised Title I allocation under each scenario.

The step-by-step calculations demonstrated for New York City in Table 3 were performed for five other urban school districts using each district's specific population and Title I funding data. A summary of the estimates for all six school districts

are shown in Table 2, demonstrating the range of reductions in annual Title I funding if the undercount of noncitizens or of noncitizens and Hispanics was 2%, 5.8% and 10% respectively.

The Council would also note that the estimated Title I loss for an individual school district may in some instances exceed the estimated loss for the state in which it is located due to the previously-discussed misallocation of funds across the nation.

Table 2: Estimated Title I Losses for Six Urban School Districts Based on Dr. Reamer's Methodology

	Title I Reduction					
School District	Undercount 2% Noncitizens	Undercount 2% Noncitizens/ Hispanic	Undercount 5.8 % Noncitizens	Undercount 5.8 % Noncitizens/ Hispanic	Undercount 10% Noncitizens	Undercount 10% Noncitizens/ Hispanic
Chicago	-$297,332	-$942,727	-$864,354	-$2,739,154	-$1,494,274	-$4,806,213
Clark County	-$119,963	-$423,793	-$348,738	-$1,248,347	-$602,890	-$2,160,581
Dallas	-$231,880	-$753,030	-$674,084	-$2,203,951	-$1,165,339	-$3,839,696
Los Angeles	-$1,160,039	-$3,990,081	-$3,372,277	-$11,678,080	-$5,829,906	-$20,342,230
Miami-Dade County	-$482,788	-$1,915,561	-$1,403,482	-$5,606,422	-$2,426,303	-$9,765,915
New York City	-$1,614,320	-$3,427,093	-$4,692,887	-$10,030,341	-$8,112,942	-$17,472,068

Table 3A: Baseline Demographic and Population Data and Application of Dr. Reamer's Methodology to NYC

U.S. Population	**351,120,745**
U.S. Noncitizens	22,337,765
U.S. Hispanic Population	61,797,251
City Population	8,560,072
City Noncitizen Population	1,427,099
City Hispanic Population	2,490,981
USA 5-17 Total	54,223,426
School District Ages 5-17 in Poverty	304,745
School District Title I Allocation Total (FY 2019)	$781,914,595.61
U.S. Baseline	**351,120,745**
(1) 2% of noncitizens are not counted in the 2020 Census;	350,673,990
(2) 2% of noncitizens *and* Hispanics are not counted;	349,438,045
(3) 5.8% of noncitizens are not counted;	349,825,155
(4) 5.8% of noncitizens *and* Hispanics are not counted;	346,240,914
(5) 10% of noncitizens are not counted;	348,886,969
(6) 10% of noncitizens *and* Hispanics are not counted;	342,707,243
NYC Baseline	**8,560,072.00**
(1) 2% of noncitizens are not counted in the 2020 Census;	8,531,530.02
(2) 2% of noncitizens *and* Hispanics are not counted;	8,481,710.40
(3) 5.8% of noncitizens are not counted;	8,477,300.26
(4) 5.8% of noncitizens *and* Hispanics are not counted;	8,332,823.36
(5) 10% of noncitizens are not counted;	8,417,362.10
(6) 10% of noncitizens *and* Hispanics are not counted;	8,168,264.00

Table 3B: Baseline Demographic and Population Data and Application of Dr. Reamer's Methodology to NYC

	Baseline and Revised Share of National Population	Ratio of Revised Share of National Population	Baseline and Revised Share of Ages 5-17 in Poverty	Ratio of Revised Share of Ages 5-17 in Poverty	Baseline and Revised Share of Kathleen's Title I Allocation	Revised Title I Allocation	Difference in Title I Allocation
NYC Baseline	2.44%		3.94%		4.09%		
(1) 3% of consideration not counted in the 2000 Census	2.45%	99.72%	3.25%	99.72%	4.08%	$ 780,800,778	-$13,514,320
(2) 3% of consideration of Hispanics not counted	2.45%	99.60%	3.25%	99.86%	4.08%	$ 778,457,833	-$15,857,265
(3) 0.5% of consideration not counted	2.43%	99.40%	3.28%	99.40%	4.09%	$ 777,251,720	-$17,063,377
(4) 0.5% of consideration of Hispanics not counted	2.41%	98.72%	3.30%	98.72%	4.52%	$ 771,694,354	-$18,620,341
(5) 10% of consideration not counted	2.41%		3.31%	98.95%	4.53%	$ 773,401,654	-$18,123,041
(6) 10% of consideration of Hispanics not counted	2.36%	97.77%	3.17%	97.77%	4.09%	$ 784,442,989	-$11,672,009

Appendix C
Table 4

CGCS Methodology for Estimating the Impact of a Census Undercount on Title I Funding for Six Urban Districts

As representatives of large urban school districts, we believe that our school-age population is even more vulnerable to an undercount in the decennial census than the general population. The diversity of large cities means that students almost certainly reside in mixed immigration-status families in greater numbers than elsewhere in the United States. In addition to the CGCS's estimates of the impact of a citizenship question on school district Title I allocations under Reamer's methodology, *see* Appendix B, the Council also developed an alternate methodology with a specific emphasis on students from mixed immigration-status families to derive an estimated national total of misallocated Title I funds, *see* Appendix A.

The Council's alternate methodology focusing on mixed immigration-status families can also use local data to calculate the impact of the citizenship question on a school district's Title I funding, and we present these findings in Table 4. The steps are the same as the methodology described in Appendix A, but rely on local-level population and funding data rather than national totals and averages. In the local-level calculation, we start with census data on the number of children aged 5-17 (in a specific city or county) who live with one or more parent who is foreign-born. We then applied the percentage of

noncitizens among all foreign-born in that city or county to derive an estimated number of children aged 5-17 living with one or more noncitizen parent. We multiplied that number by the local percentage of poverty of noncitizens to determine the number of Title I-eligible children in the school district living with a noncitizen parent. We then applied the undercount percentages (2%, 5.8%, 10%) used by Dr. Reamer to get an estimated number of Title I-eligible children in the school district who won't be counted by the census. This number of children, multiplied by that school district's Title I per-child amount in federal FY 2019, results in the estimated Title I allocation loss for the school district.

The purpose of this second set of local estimates is to use a methodology that more closely reflects the population of students in urban areas and determine the effect of the citizenship question on Title I funding. As a result, the range of estimated losses in Table 4 is larger for school districts than the estimates in Table 2 in each of the undercount scenarios involving noncitizen responses.

Table 4: Estimated Impact of a Census Undercount on Title I Funding for Six Urban Districts

Table 4A: Base Population Estimates				
School District	Total 5-17 Population from Families with one or more foreign-born parents	Noncitizen Percentage of Foreign-born Population	Noncitizens Population	Noncitizen Poverty Percentage
Chicago	147,435	56.2%	82,858	23.4%
Clark County	118,404	51.9%	61,428	20.5%
Dallas	53,900	78.0%	42,042	25.0%
Los Angeles	473,072	20.5%	96,980	28.0%
New York	679,293	44.8%	304,323	24.2%

Table 4B: Estimated Undercounts				
School District	Number of Poor Students Ages 5-17 with One or More Noncitizen Parents	Estimated Census Undercount of Poor Students Ages 5-17 with One or More Noncitizen Parents 2%	Estimated Census Undercount of Poor Students Ages 5-17 with One or More Noncitizen Parents 5.8%	Estimated Census Undercount of Poor Students Ages 5-17 with One or More Noncitizen Parents 10%
Chicago	19,389	388	1,125	1,939
Clark County	12,593	252	730	1,259
Dallas	10,511	210	610	1,051
Los Angeles	27,154	543	1,575	2,715
Miami	14,830	297	860	1,483
New York	73,646	1,473	4,271	7,365

Table 4C: Title I Per Pupil Allocations and Estimated Losses				
School District	Title I Allocation Per Pupil	Estimated Title I Loss with a 2% Undercount	Estimated Title I Loss with a 5.8% Undercount	Estimated Title I Loss with a 10% Undercount
Chicago	$2,750	-$1,066,229	-$3,092,064	-$5,331,144
Clark County	$1,602	-$403,395	-$1,169,845	-$2,016,975
Dallas	$1,683	-$353,835	-$1,026,121	-$1,769,174
Los Angeles	$2,289	-$1,242,922	-$3,604,475	-$6,214,611
Miami	$1,671	-$495,508	-$1,436,973	-$2,477,540
New York	$2,505	-$3,689,659	-$10,700,011	-$18,448,295